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Rolling Limitation Periods: What Resets the Clock?

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What will establish a "rolling" limitation period? In other words, why does the limitation clock start over again in one case, but not another?

The Ontario Court of Appeal casts some light on these questions in its recently released decision, *Marvelous Mario's Inc. v. St. Paul Fire and Marine Insurance Co.*, 2019 ONCA 635 ("*Marvelous Mario's*").

The *Marvelous Mario's* case involved two actions in which the plaintiffs claimed insurance coverage under a commercial insurance policy. The first action was for indirect losses the plaintiffs claimed were suffered in their business. The trial judge dismissed the first action in its entirety, holding that indirect losses were not covered by the policy.

The second action was for business interruption losses. The trial judge allowed the claim, but only in part. The contract contained a one-year limitation period clause that is seen in many cases dealing with insurance policies:

ACTION: Every action or proceeding against the insurer for the recovery of any claim under or by virtue of this contract is absolutely barred unless commenced within one year next after the loss or damage occurs.

Although the policy contained this one-year limitation period, the action had not been commenced for almost two years. Nevertheless, the trial judge held that the claim for business interruption losses was an on-going claim, and, therefore, subject to a rolling limitation period. In the result, the trial judge found that losses which occurred within the one-year period leading up to the commencement of the second action could proceed. It was only the losses that predated one year before the commencement of the second action that were barred.

The plaintiffs appealed, claiming indemnification for all of their losses. The defendant cross-appealed, arguing that the trial judge erred in holding that there was a rolling limitation period allowing indemnification for even some of the plaintiffs' losses.

The Court of Appeal dismissed the appeal and allowed the cross-appeal. It agreed with the defendant that the trial judge erred on the issue of a rolling limitation period. The Court found that all of the plaintiffs' claims were time-barred.

Arguments about whether or not there is a rolling limitation period regularly arise in the context of claims under insurance policies, including claims for disability payments, no-fault accident benefits, and income replacement benefits. Such arguments also arise in the context of other commercial contracts, such as a claim for rent payments under a commercial lease.

The Court of Appeal in *Marvelous Mario's* found that the cases cited to it were not on all fours, or not binding and largely devoid of analysis. The Court found it "necessary therefore to consider first principles to determine whether this is one of those instances where the court should recognize a rolling limitation period."

The Court found that for a rolling limitation period to apply, the defendant must have a recurring contractual obligation that has been breached, "beyond the original breach" (para. 35):

The jurisprudence suggests that a rolling limitation period may apply in a breach-of-contract case in circumstances where the defendant has a recurring contractual obligation. The question is not whether the plaintiff is continuing to suffer a loss or damage, but whether the defendant has engaged in another breach of contract beyond the original breach by failing to comply with an ongoing obligation. In cases where there have been multiple breaches of ongoing obligations, it is equitable to impose a rolling limitation period.

The Court found that the trial judge had erred by focussing her analysis on the question of "whether the appellants were continuing to suffer damages" rather than on the issue of "whether the respondent had a recurring contractual obligation" (para. 37).

In the *Marvelous Mario's* fact situation, the Court of Appeal held that the defendant was not obligated to make recurring payments under the policy, but, rather, was obligated to pay business interruption losses "in their totality". This was unlike the situation, for example, under a commercial lease where a tenant has a recurring obligation to occupy the premises every month during the term of a lease. This can give rise to a new claim against the tenant each month that the tenant fails to occupy the premises.

The Court of Appeal also noted that the inability to know the precise amount of damages at the time of breach is of no moment. The cases have long held that not knowing the full extent of the damages suffered does not stop the commencement of a limitation period. Under the insurance policy applicable in this case, once it was known that loss or damage had occurred, the plaintiffs were required to commence their claim within one year.

In summary, to determine whether a rolling limitation period applies, it is important to focus on a defendant's contractual obligations rather than the plaintiff's injury. In the ordinary course, a plaintiff may feel the sting of his or her loss with the arrival of each new day. But that is not the test. Rather, a rolling limitation period will be found only where a defendant has a recurring contractual obligation that gives rise to separate breaches of contract.

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